

UNITED STATES BANKRUPTCY COURT  
EASTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION

In re: Margie Ann Smith

Debtor.

Case No. 05-44251  
Chapter 13  
Hon. Marci B. McIvor

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**OPINION REGARDING HOMECOMINGS FINANCIAL NETWORK'S MOTION FOR  
RELIEF FROM AUTOMATIC STAY**

This matter came before the Court on the Motion of creditor Homecomings Financial Network for Relief from the Automatic Stay. Homecomings seeks to have the Court retroactively lift the stay on property at 15851 Lappin, Detroit, Michigan, as of the date of the filing of Debtor's petition thereby validating a foreclosure sale which took place after the petition was filed. Homecomings asserts that the foreclosure did not violate the automatic stay because the property foreclosed upon was not property of the estate. For the reasons stated in this Opinion, the Court holds that Homecomings was required to seek relief from the stay prior to conducting its foreclosure sale. The Court denies Homecomings' request to annul the stay and holds the foreclosure sale void *ab initio*.

**Background**

The facts are undisputed. On September 7, 2000, debtor Margie Smith borrowed \$60,800 from Homecomings Financial Network secured by her residence located at 15851 Lappin, Detroit, Michigan. At some later date, she executed a second mortgage to National Window Company c/o Pines Investment Co. on the same property. On June 30, 2004, National Window foreclosed its mortgage. Debtor's statutory right to redeem the property expired six months later, on December 30, 2004. Debtor did not redeem the

property and National Window took no action to evict Debtor.

On February 14, 2005, Debtor filed a voluntary chapter 13 bankruptcy.

Notwithstanding the fact that her interest in the residence had been foreclosed upon by National Window, Debtor included the Lappin property on Schedule A at a market value of \$70,000 with Homecomings' \$60,000 secured claim against it. Debtor claims a \$10,000 exemption for the property under § 522(d)(1). Homecomings was sent notice of the bankruptcy on February 16, 2005.

On February 24, 2005, 10 days after the bankruptcy petition was filed, a foreclosure sale was held on Homecomings' mortgage. In April, 2005, Debtor and National Window entered into a "Stipulated Order Setting Aside Sheriff's Deed and Restoring Mortgage" which this Court entered on May 2, 2005.<sup>1</sup> On May 12, 2005, Homecomings filed the present Motion to Lift Stay.

Homecomings asserts that because Debtor failed to redeem the property by December 30, 2005, all of her rights, title and interest in the property vested in the grantee of the sheriff's deed, National Window Company. Homecomings further argues that since Debtor had no legal or equitable interest in the property after that date, the property never became part of the bankruptcy estate and its February foreclosure on the senior mortgage did not violate the automatic stay. It seeks to have the Court retroactively lift the stay and validate the foreclosure.

Debtor asserts that even if she had no legal or equitable interest in the property, she

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<sup>1</sup>That Order has purportedly been recorded at the Wayne County Register of Deeds.

had a possessory interest which became part of the estate and triggered the automatic stay. Debtor argues that Homecomings was required to move for a lift of stay before its foreclosure sale and that failure to do so voids the sale.

### Analysis

A Chapter 11 bankruptcy petition operates as a stay of “any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate.” 11 U.S.C. § 362(a)(3). “Property of the estate” as set forth in 11 U.S.C. § 541 is broad and includes all legal and equitable interests the debtor may have on the date the petition was filed. It also includes bare “possessory” interests in property. *Convenient Food Mart No. 144, Inc. v. Convenient Indus. Of Am., Inc. (In re Convenient Food Mart No. 144, Inc.)*, 968 F.2d 592 (6<sup>th</sup> Cir. 1992).

In the *Convenient Food Mart* case, the debtor was the lessee of commercial property whose lease expired pre-petition. The debtor retained possession as a holdover tenant and the issue before the Sixth Circuit Court of Appeals was whether a holdover tenant with a tenancy at sufferance had a property interest sufficient to trigger the bankruptcy court’s jurisdiction. The Court found that it did.

Although this matter has not previously been resolved in this circuit, the Second and Third Circuits have held that possessory interests in real property fall within the ambit of the protections provided by the automatic stay. *In re 48<sup>th</sup> St. Steakhouse, Inc.*, 835 F.2d 427, 430 (2d Cir. 1987), *cert. denied*, 485 U.S. 1035, 108 S.Ct. 1596, 99 L.3d. 2d 910 (1988); *In re Atlantic Business and Community Corporation*, 901 F.2d 325, 328 (3d. Cir. 1990).

**CFM’s undisputed possessory interest in the property is the legal interest creating jurisdiction in this case.** . . . We join the other circuits in holding that a tenancy at sufferance is a possessory interest in real property within the scope of the estate in bankruptcy under section 541. *In re 48<sup>th</sup> St. Steakhouse*,

*Inc.*, 835 F.2d 427; *In re Atlantic*, 901 F.2d 325.

*In re Convenient Foodmart*, 968 F.2d at 594 (emphasis added).

The *Convenient Food Mart* case was cited favorably by a recent decision with facts similar to the facts of the instant case. In *In re Dominguez*, 312 B.R. 499 (Bankr. S.D.N.Y. 2004), the city of Newburgh, New York foreclosed on the debtor's home (for payment of property taxes) and the redemption period expired prior to the filing of debtor's chapter 13 petition. When the city obtained a foreclosure judgment post-petition without seeking relief from the automatic stay, the debtor filed a motion to compel enforcement of the automatic stay. The city argued that because the redemption period expired before the bankruptcy petition was filed, the property was not protected by the stay and the city was not required to seek relief from the stay before proceeding in state court.

In rejecting this argument, the court cited relevant case law from ten circuits in support of the proposition that a mere possessory interest in property is sufficient to trigger the automatic stay:

Even if the City is correct in their assumption that Debtor's right to redeem the property had expired and her bankruptcy filing did not restore those rights, the City nonetheless skipped a significant step by proceeding, post-petition, to obtain a judgment of foreclosure and sale, and then by taking action to enforce that judgment, without proving to this Court that it was entitled to stay relief. Although the City maintains that it did not need to seek stay relief because the Debtor's right to redemption had expired, the City had an obligation to prove to this Court that indeed, the Debtor's right had expired, prior to proceeding in the state court, and in any event, to show that cause existed to lift the stay to divest her of her possessory interest. The germane Second Circuit case law shows that the stay was triggered by Debtor's filing because although there is a dispute as to whether Debtor has a legal interest in the Property, there is no question that Debtor has been in possession of the Property at all times relevant to this controversy. It is well settled that a debtor's mere possessory interest in premises, even absent any legal interest, is protected by the automatic stay. See *In re 48th Street Steakhouse*, 835

F.2d 427, 430 (2d Cir. 1987)(A mere possessory interest in real property, without any accompanying legal interest, is sufficient to trigger the protection of the automatic stay) *In re Haynes*, 283 B.R. 147 (Bankr. S.D.N.Y. 2002); *In re Eclair Bakery Ltd.*, 255 B.R. 121 (Bankr. S.D.N.Y. 2000). In fact, case law in all ten circuits that have ruled on this issue hold that a possessory interest in property is protected by the automatic stay. See *ICC v. Holmes Transp., Inc.*, 931 F.2d 984 (1st Cir. 1991); *Cuffee v. Atl. Bus. & Cmty. Dev. Corp. (In re Atl. Bus. & Cmty. Corp.)*, 901 F.2d 325 (3rd Cir. 1990); *In re Connecticut Pizza, Inc.*, 193 B.R. 217 (Bankr. D. Md. 1996); *Boydston v. Reed*, 218 B.R. 840 (N.D. Miss. 1998); *In re Convenient Food Mart No. 144, Inc.*, 968 F.2d 592 (6th Cir. 1992); *In re Wright*, 183 B.R. 541 (Bankr. C.D. Ill. 1995); *In re Lankford*, 305 B.R. 297 (Bankr. N.D. Iowa 2004); *Galam v. Carmel (In re Larry's Apt., L.L.C.)*, 249 F.3d 832 (9th Cir. 2001); *In re Gagliardi*, 290 B.R. 808 (Bankr. D. Colo 2003); *Trizec Colony Square, Inc. v. Gaslowitz (In re Addon Corp.)*, 231 B.R. 385 (Bankr. N.D. Ga 1999). The City has obviously confused their purported right to relief from the stay with whether the stay was ever triggered at all as to the Debtor's property. As Judge Gerber pointed out in the *Eclair Bakery* case, ". . . while these remaining [possessory] rights on the part of the debtor . . . trigger the applicability of the automatic stay in the first instance, they are not determinative of the **fundamentally different question** as to whether the stay, once triggered, should be modified or terminated for cause . . ." See *Eclair Bakery*, at 134 (emphasis supplied).

*Dominguez*, 312 B.R. at 505-506 (underscore added). The court thus made a distinction between determining whether a mere right of possession triggers the automatic stay from whether the stay, once applicable, should be lifted. Having found that debtor's right to possess the property triggered the automatic stay, the court went on to hold that the post-petition foreclosure judgment was null. *Accord Yancy v. Adree Acceptance Co. (In re Yancy)*, 23 B.R. 945, 951 (Bankr. E.D. Mich. 1982)(foreclosure proceedings in violation of the automatic stay set aside as void).

In the present case, to determine the nature of Debtor's interest (if any) in the Lappin property at the time the bankruptcy was filed, the Court must look to Michigan property law. Michigan law provides that a mortgagor whose property is sold pursuant to

foreclosure proceedings has a right, within six months of the sale, to redeem the property. M.C.L. § 600.3140. When not redeemed, a sheriff's deed ripens into legal title and cuts off all junior interests in the property that were not consented to by the mortgagee. M.C.L. §600.3236.<sup>2</sup> Because the sheriff's sale in this case was held on June 30, 2004, Debtor had until December 30, 2004 to redeem the property. She did not redeem, thus the sheriff's deed vested all Debtor's legal and equitable interest in the property in National Window. Debtor, however, retained possession of the property and under applicable Sixth Circuit law (*In re Convenient Food Mart*), that interest was sufficient to trigger the automatic stay as to the Lappin property when Debtor filed for bankruptcy. Because Debtor's possessory interest in the real property triggers the stay, Homecomings Financial violated the automatic stay when it initiated post-petition foreclosure proceedings.

Homecomings relies on two cases to support its assertion that Debtor's residence was not property of the estate and that its foreclosure sale did not violate the automatic stay. Neither opinion supports Homecomings' position. *In re Sieloff*, 164 B.R. 560 (Bankr. W.D. Mich. 1994) and *In re Printup*, 264 B.R. 169 (Bankr. E.D. Tenn. 2001) both involved debtors who had possession of vehicles but were not listed on the vehicle's title. In each case, a creditor repossessed the vehicle post-petition asserting that because the vehicle's title was not in the debtor's name, it was not the debtor's vehicle and was not

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<sup>2</sup>M.C.L. § 600.3236 provides in part:

Unless the premises described in such deed shall be redeemed within the time limited for such redemption as hereinafter provided, such deed shall thereupon become operative, and shall vest in the grantee therein named, his heirs or assigns, all the right, title and interest which the mortgagor had at the time of the execution of the mortgage, or at any time thereafter. . .

property of the estate subject to the automatic stay. Both courts disagreed, finding that despite the fact that the debtors did not have legal title to the vehicles, each had a possessory interest sufficient to trigger the automatic stay. Both creditors were found to have violated the automatic stay.

Homecomings cites language from *Sielaff* to distinguish possessory rights which are protected by the stay (i.e. rights arising from a legitimate cognizable right to possess) from those which are not protected by the stay (e.g. possession of stolen property). *Sieloff*, 163 B.R. and 566-67. Homecomings fails to articulate how the distinction furthers its case on the present facts. It is undisputed that Debtor purchased the Lappin property in 2000 and has legally retained possession of it since that time. While National Window foreclosed its mortgage in June 2004, eviction proceedings were not initiated.

Homecomings cites *Printup* to support the proposition that where a debtor has a mere possessory interest in property, only interference with the debtor's actual possession of the property (i.e. "by 'exercising control' over the debtor's possessory interest") violates the stay. *Printup*, 264 B.R. at 174-75. Homecomings argues that because it merely foreclosed its mortgage and did not attempt to physically evict Debtor from the property ("exercise control" over the property), it did not interfere with Debtor's possessory interest and it did not violate the stay. Homecomings reliance on *Printup's* narrow view of what constitutes interference with possession is misplaced. In a case involving real property, it strains credulity to argue that a foreclosure action does not interfere with a debtor's possessory interest. The *Printup* case involved a vehicle, not real



Dated: July 8, 2005  
Detroit, Michigan

cc: Noel Aaron Cimmino  
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